

Message Text

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ORIGIN L-03

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JUSTICE

-----113130 301408Z /45

R 301308Z AUG 77
FM SECSTATE WASHDC
TO AMEMBASSY MANILA

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E.O. 11652: GDS

TAGS: MILI, RP

SUBJECT: NUGUID VS GAINES, ET AL (CIVIL SUIT)

REFS: (A) MANILA 12366; (B) 13 AF MSG DTG 030745Z,
AUG 77 (NOTAL); (C) STATE 178425

1. WE AGREE THAT WE SHOULD AVOID GIVING PHILIPPINE COURT
AND DFA MISLEADING IMPRESSION THAT ADMINISTRATIVE CLAIMS
PROCEDURES WILL NECESSARILY RESULT IN PAYMENT OF A CLAIM
TO NUGUID. AFTER FURTHER CONSIDERATION, HOWEVER, WE DO
NOT BELIEVE INVOCATION OF SOVEREIGN IMMUNITY OR SUGGESTION
THAT USG HAS A RIGHT TO INVOKE SOVEREIGN IMMUNITY IN THIS
CASE IS APPROPRIATE.

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2. THE POLICY OF THE USG WITH RESPECT TO SOVEREIGN
IMMUNITY FROM SUIT IN TORT CLAIMS IS CLEARLY SET FORTH
IN SECTION 1605(A)(5) OF THE FOREIGN SOVEREIGN IMMUNITIES
ACT OF 1976; SOVEREIGN IMMUNITY WILL NOT BE GRANTED TO
FOREIGN STATES IN INSTANCES WHERE MONEY DAMAGES ARE SOUGHT
FOR PERSONAL INJURY CAUSED BY THE TORTIOUS ACT OR OMISSION
IN THE U.S. OF ANY OFFICIAL OF SUCH STATE WHILE ACTING

WITHIN THE SCOPE OF HIS DUTY. ALL FOREIGN DIPLOMATIC MISSIONS IN WASHINGTON WERE FORMALLY NOTIFIED LATE LAST YEAR THAT THE USG WOULD FIRMLY ADHERE TO THAT POLICY.

3. ALL AGENCIES AND INSTRUMENTALITIES OF USG WHOSE ACTIVITIES ABROAD GENERATE LAWSUITS AGAINST USG WERE ALSO FORMALLY ADVISED BY ATTORNEY GENERAL THAT USG WOULD FOLLOW THE SAME POLICY IN LAWSUITS BROUGHT AGAINST USG BEFORE FOREIGN TRIBUNALS, REGARDLESS OF POLITICAL IMPLICATIONS OR ADMINISTRATIVE INCONVENIENCE.

4. DEPARTMENT AND DOJ WISH TO STRESS THAT POLICY REGARDING DEFENSE OF SOVEREIGN IMMUNITY DOES NOT DEPEND ON MERITS OF A GIVEN CASE. IF CASE LACKS SUBSTANCE, IT WILL BE DEFENDED ON MERITS, NOT ON GROUNDS OF LACK OF JURISDICTION. NUGUID CASE, DESPITE ITS APPARENT LACK OF MERITS, THUS FALLS SQUARELY WITHIN THIS POLICY.

5. IN LIGHT OF FOREGOING, WE BELIEVE IT WOULD BE INAPPROPRIATE AND MISLEADING FOR USG TO ADVISE DFA, OR FOR ATTORNEY LUNA TO ADVISE COURT, THAT USG QUOTE HAS NOT GIVEN ITS CONSENT TO SUIT UNQUOTE. UNDER RESTRICTIVE THEORY OF IMMUNITY AS EMBODIED IN FOREIGN SOVEREIGN IMMUNITIES ACT, SUBJECTION OF USG TO SUIT UNDER CIRCUMSTANCES OF THIS CASE WOULD NOT BE A MATTER OF CONSENT, BUT WOULD FOLLOW AS A MATTER OF LAW. (PLAINTIFF'S MOTION TO LIMITED OFFICIAL USE

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OBTAIN CONSENT TO BE SUED, AS RELAYED IN MANILA 11190, IS A PROCEDURAL DEVICE UNKNOWN TO DEPARTMENT AND TO DOJ. EMBASSY REQUESTED TO POUCH TO DEPARTMENT AND TO DOJ SOONEST COPY OF SECRETARY OF JUSTICE CIRCULAR NO. 47 OF AUGUST 5, 1973.)

6. AF AUTHORITIES SHOULD DECIDE NUGUID'S ADMINISTRATIVE CLAIM AT THE EARLIEST OPPORTUNITY. WE ARE IN NO POSITION TO ASSESS MERITS OF HIS CLAIM. WE ARE, HOWEVER, DISINCLINED TO BELIEVE THAT A FAVORABLE SETTLEMENT WOULD BE AN ADMISSION OF SOME SORT OF CULPABILITY ON PART OF USG; RATHER, IT WOULD SEEM EQUALLY PLAUSIBLE TO CONSIDER AN EX GRATIA PAYMENT AS SIMPLY AN ACKNOWLEDGEMENT THAT AN INDIVIDUAL WAS HURT IN THE COURSE OF LEGITIMATE USG OPERATIONS. NOR DO WE BELIEVE THAT RASH OF TOTALLY UNJUSTIFIED COMPLAINTS SHOULD NECESSARILY FOLLOW OR PROVE UNMANAGEABLE. IF THE INDIVIDUALS IN QUESTION WERE NOT INJURED AND ARE MAKING WHOLLY MERETRICIOUS CLAIMS, PRESUMABLY THEIR CLAIMS CAN BE REJECTED AND NUMBER OF SUCH CLAIMS WILL DIMINISH.

7. WHEN ADMINISTRATIVE CLAIM HAS BEEN RULED UPON, WE

PRESUME IT WILL BE SUPPORTED BY ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND THAT THESE CAN BE PRESENTED TO COURT WITH EXPLANATION THAT CLAIM WAS ADJUDICATED BY COMPETENT AUTHORITIES UNDER APPLICABLE U.S. LAW, AS ENVISAGED BY ARTICLE 23 OF MBA. IF IT IS DETERMINED THAT CLAIM IS WITHOUT MERIT AND THAT IT IS NOT IN USG INTEREST, IN EFFECT, TO MAKE AN EX GRATIA PAYMENT, THIS NEGATIVE DETERMINATION SHOULD BE ABLE TO STAND ON ITS OWN FEET.

8. WE CONTINUE TO BELIEVE THAT RESPONSE TO DFA ALONG LINES OF PARA 3, REF C IS MOST ADVISABLE. MINOR AMENDMENT ALONG FOLLOWING LINES MAY BE ADVISABLE TO AVOID MISLEADING GOP AUTHORITIES INTO EXPECTING A PAYMENT: QUOTE: IN THIS REGARD THE EMBASSY HAS THE HONOR TO INFORM LIMITED OFFICIAL USE

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THE DFA THAT PLAINTIFF IN THE CASE IN QUESTION HAS ALSO FILED A CLAIM FOR DAMAGES DIRECTLY WITH U.S. MILITARY AUTHORITIES IN THE MANNER ENVISAGED BY ARTICLE 23 OF THE MBA OF 1947. IT IS THE EMBASSY'S UNDERSTANDING THAT U.S. MILITARY AUTHORITIES WILL ADDRESS PLAINTIFF'S CLAIM IN THE PRESENT CASE AS EXPEDITIOUSLY AS POSSIBLE. THE DISPOSITION OF THIS CLAIM MAY SIGNIFICANTLY AFFECT OR 8BVIATE ENTIRELY FORMAL LEGAL PROCEEDINGS. UNDER THESE CIRCUMSTANCES THE EMBASSY BELIEVES IT WOULD BE PREMATURE AT THIS TIME TO ADDRESS THE QUESTION OF THE USG'S IMMUNITY IN THE PRESENT CASE. UNQUOTE. VANCE

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